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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1965.

No. 183

THE TRUSTEES OF SCHOOLS OF TOWNSHIP THREE (3), RANGE NINE (9) WEST OF THE THIRD PRINCIPAL MERIDIAN, IN MADISON COUNTY, ILLINOIS, To-wit: JOHN HARBIG, JOHN KUNNEMANN and GEORGE HUGHES,
Appellees,

vs.

HAROLD WILLIAM KRONSBEIN, et al.,
Appellant.

On Appeal from the Supreme Court of Illinois.

MOTION

To Dismiss or Affirm.

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INDEX.

	Page
Motion to dismiss or affirm	1
Statement	3
Points and authorities	8
Suggestions	11
Conclusion	12
Appendices	15
I.	
Pertinent section of Civil Practice Act of Illinois, Section 138, Chapter 110, Illinois Revised Statutes 1953	15
II.	
Pertinent section of Civil Practice Act of Illinois, Section 72, Chapter 110, Illinois Revised Statutes 1959	16
III.	
Pertinent section of Eminent Domain Act of Illinois, Chapter 47, Section 12, Illinois Revised Statutes 1953	18
IV.	
Pertinent section of Civil Practice Act, Chapter 110, Illinois Revised Statutes 1953	18

Cases Cited.

Bachrach v. Burkhardt, 344 Ill. App. 80 at 86, 100 N. E. 2d 334 at 337	9
Barnard v. Michael, 392 Ill. 130 at 135, 63 N. E. 2d 858 at 861-862	8

Cherin v. The R. & C. Co., 11 Ill. 2d 447 at 454, 143 N. E. 2d 234 at 238 8
Chicago & Northwestern Railway Company v. The Chicago Mechanics Institute, 239 Ill. 217, 87 N. E. 942 10
Congress of Industrial Organization v. McAdory, 325 U. S. 476, 89 L. Ed. 1745 8
Convers v. The Atchison, Topeka and Santa Fe R. R., 142 U. S. 671, 35 L. Ed. 1153..... 12
County of Cook v. Vander Wolf, 394 Ill. 527 at 528, 69 N. E. 2d 260 at 263 10
Hulbert v. Chicago, 202 U. S. 275, 50 L. Ed. 1026 8
In re: Petition of Stern, 2 Ill. App. 2d 311 at 314, 120 N. E. 2d 62 at 64 8
The People v. Kidd, 398 Ill. 405 at 409, 75 N. E. 2d 851 at 854 9
Willoughby v. Chicago, 235 U. S. 45, 59 L. Ed. 123... 8

Miscellaneous Cited.

Rule 16, Revised Rules of United States Supreme Court 1
Section 14, Chapter 47, Illinois Revised Statutes 1953. .....2, 3, 7, 9
Section 14, Chapter 110, Illinois Revised Statutes 1953 .....2, 3, 4, 8, 11
Section 72, Chapter 110, Illinois Revised Statutes 1959 4

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HAROLD WILLIAM KRONSBEIN, et al.,
Appellant.

On Appeal from the Supreme Court of Illinois.

MOTION

To Dismiss or Affirm.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

MOTION TO DISMISS OR AFFIRM.

Appellees, pursuant to Rule 16 of the Revised Rules of this court, move to dismiss this appeal, or to affirm the judgment of the Supreme Court of Illinois, for the following reasons:

1. It does not question the validity of any statute of Illinois on the grounds of its being repugnant to the constitution, the treaties or laws of the United States, nor does it involve the validity of any treaty or statute of the United States.

2. It does not involve any substantial federal question, but merely raises a question of the interpretation of a statute entirely local to Illinois, without involvement of any federal question but adequately based upon well settled non-federal grounds.

3. It does not raise any question as to the validity of the statute (Section 14, Chapter 110, Illinois Revised Statutes 1953) interpreted by the Supreme Court of Illinois in deciding the question of whether the trial court had jurisdiction of appellant.

4. The Supreme Court of Illinois merely decided that the trial court had jurisdiction of appellant at the time the condemnation judgment was entered. Since jurisdiction was the only question before that court, the time for a direct appeal on the merits of the condemnation proceeding has long since expired.

5. The reference by the Supreme Court of Illinois to Section 14, Chapter 47, Illinois Revised Statutes 1953, was not necessary to the decision reached by that court. The decision, however, does not deny appellant just compensation for his interest in the real estate condemned.

STATEMENT.

The appellant in his statement of this case has misdirected this court as to the question passed upon by the Supreme Court of Illinois.

What that court decided was that appellant was properly in court, and subject to the jurisdiction thereof in 1953 by reason of substituted service made pursuant to Section 14, Chapter 110, Illinois Revised Statutes 1953 (See Opinion A, 3 and 4). The court's reference to the application of Section 14, Chapter 47, Illinois Revised Statutes 1953, to the facts of this case was obiter dictum and was not necessary for the determination of the question presented by the appeal.

In November, 1960, an attempt was made to open this litigation when appellant, then 43 years of age, filed his petition to vacate a condemnation judgment rendered against him in November, 1953. His petition, filed in the same court that rendered the judgment, prayed that the judgment entered in the condemnation case be vacated for want of jurisdiction over his person, either by personal service or by substituted service (Abs. of Rec. in Ill. Su. Ct., 32 and 33).

Over objection of appellees, evidence was heard on appellant's petition and the trial court found that appellant had never been served with process and that the judgment was therefore void as to him (Appendix D, pg. A38).

Appellee perfected an appeal to the Appellate Court of Illinois (an intermediate court of review) and that court affirmed the judgment of the trial court (Appendix C, pg. 9, A22).

The Supreme Court of Illinois upon application by appellee granted leave to appeal from the judgment of

the Appellate Court and reversed both the judgment of the trial court and that entered by the Appellate Court, and denied a petition for rehearing filed by appellant (Appendix A, pg. A5).

The sole question before all of these courts was whether the trial court had obtained jurisdiction of the appellant by a publication notice based upon an affidavit as prescribed by Section 14, Chapter 110, Illinois Revised Statutes 1953 (Appellee's Appendix I). The Illinois Supreme Court decided that the affidavit for publication was sufficient and that the trial court did have jurisdiction of appellant at the time the condemnation judgment was entered.

The sole purpose of the motion to vacate the judgment of 1953 was to re-open that litigation on the grounds that the trial court did not have jurisdiction of the person of appellant either by personal or substituted service. The motion was authorized by Section 72, Chapter 110, Illinois Revised Statutes 1959 (Appellee's Appendix II).

When the Illinois Supreme Court determined that the trial court did have jurisdiction of appellant at the time the condemnation judgment was entered, all other questions, including the payment to the County Treasurer, becamme moot as the time to appeal therefrom on any issue except juridiction had long since expired (Appellee's Appendix III and IV).

The statement filed by appellant so garbles the facts with reference to the condemnation proceeding that we feel they should be restated.

In 1910, Henry Fehling died testate, the fee simple owner of the land in question. By Article Ten of his will he left the real estate here involved to his executors and trustees who were directed not to sell or mortgage any part thereof, but to pay the annual income to his daughter, Frieda M. Fehling (later Frieda M. Kronsbein). By

Article Eleven of his will he provided that upon the death of his aforesaid daughter, either before or after his death, her share was to go to her **issue**, if any, and in the event she left no **issue** then to his grandchildren, whoever they may be (Rec. in Ill. Sup. Ct. 34-43).

Frieda Fehling Kronsbein, daughter of Henry Fehling, was living at the time appellant filed his petition to vacate the condemnation judgment. She died on April 1, 1965, while this case was pending in the Illinois Supreme Court (Add. Statement, Brief and Argument filed by appellant in Ill. Sup. Ct., pg. 3).

In August, 1953, the appellees filed a petition to condemn 36.16 acres of the real estate above mentioned. After the formal allegations contained in such petitions, appellees alleged:

> "that the defendant, Harold William Kronsbein, is the son and issue of the said Frieda M. Kronsbein, nee Frieda M. Fehling; that the said Harold William Kronsbein has a certain interest in said real estate under the said will; that by the terms thereof the said Henry Fehling, deceased, gave and devised certain real estate, including the said tract of land, after the death of the said Frieda M. Kronsbein, nee Frieda M. Fehling, to her issue, if any. That the said Harold William Kronsbein is the son and sole issue of the said Frieda M. Kronsbein, nee Frieda M. Fehling."

The petition set forth an alternative allegation wherein the grand-children of Henry Fehling were named, and it was alleged that their interest, if any, in the land involved was in the nature of a contingent remainder (Rec. in Ill. Su..Ct. 7).

Service was had upon all parties named in the petition, either personally or by publication, as has been decided by the Supreme Court of Illinois (Appendices A and B).

Thereafter, in November, 1953, the court entered an order finding in part, as follows:

> "that the defendant, Harold William Kronsbein, is the son and issue of the said Frieda M. Kronsbein, **nee Frieda M. Fehling; that the said Harold William Kronsbein has a certain interest in said real estate under the said will; that by the terms thereof the said Henry Fehling, deceased,** gave and devised certain real estate, including the said tract of land, after the death of the said Frieda M. Kronsbein, nee Frieda M. Fehling, to her issue, if any. That the said Harold William Kronsbein is the son and sole issue of the said Frieda M. Kronsbein, nee Frieda M. Fehling, and that both the said Frieda M. Kronsbein and said Harold William Kronsbein are living."

That order concluded with an adjudication that a judgment of condemnation be entered and that the matter of ascertaining the amount of just compensation be submitted to a jury.

A jury was impaneled and the value of the land taken was fixed and determined.

On November 23, 1953, the court entered its judgment order on the verdict of the jury and among other findings provided as follows:

> "It Is Further Ordered and Adjudged by the court, that the judgments herein mentioned for the tract or parcel of land as described in the petition, and more fully described in the preliminary order of this court, shall be in full compensation for land taken, and for all compensation and damages of every character to land not taken.
>
> It Is Further Ordered and Adjudged by the court, that petitioners within a period of 30 days from this date, which the court finds to be a reasonable time, shall pay the respective sums above set forth, being

the amount of just compensation ascertained and reported by the jury and the stipulation of the parties, to the County Treasurer of Madison County, Illinois, **for the benefit of owners of, and parties interested in said tract of land,** and upon payment thereof in full, petitioners and their successors in office or assigns, shall have the right to enter upon the tract or parcel of land described in said petition and more particularly described in the preliminary order of this court, for the purposes therein set forth, as follows:"

"It Is Further Ordered, Adjudged and Decreed by the court that the filing of the receipt of the Treasurer of Madison County, Illinois, showing the payment of said monies by petitioners, as herein determined for said tract or parcel of land, shall constitute a complete justification and satisfaction for the tract or parcel of land as herein above described."

The court did not in that order determine and fix the interests of the defendants in the condemnation suit.

Thereafter, appellees, in accordance to the provisions of that order and under the sanction of Section 14, Chapter 47, Illinois Revised Statutes 1953, paid the County Treasurer the amount fixed by the order for the land involved, and have been in continuous and exclusive possession thereof ever since.

With that payment appellees' obligation to the defendants in the condemnation case terminated.

POINTS AND AUTHORITIES.

I.

The appeal does not question the judgment of the Illinois Supreme Court in its interpretation that the trial court had jurisdiction of appellant pursuant to Section 14, Chapter 110, Illinois Revised Statutes 1953.

(A)

This court accepts the conclusion of the state court as to the proper construction of its statutes.

No Federal question is presented to this court for review, inasmuch as no Federal question was decided by the Illinois Supreme Court, nor could such question have been decided by that court, as it was not presented for decision.

Willoughby v. Chicago, 235 U. S. 45, 59 L. Ed. 123;
Congress of Industrial Organization v. McAdory, 325 U. S. 476, 89 L. Ed. 1745;
Hulbert v. Chicago, 202 U. S. 275, 50 L. Ed. 1026.

(B)

A petition to vacate an order, judgment or decree filed more than thirty days after the entry thereof, and made to the court that rendered it, is a collateral attack upon such order, judgment or decree.

Cherin v. The R. & C. Co., 11 Ill. 2d 447 at 454, 143 N. E. 2d 234 at 238;
In re: Petition of Stern, 2 Ill. App. 2d 311 at 314, 120 N. E. 2d 62 at 64;
Barnard v. Michael, 392 Ill. 130 at 135, 63 N. E. 2d 858 at 861-862.

(C)

Jurisdiction is authority to hear and determine a cause. It is the power conferred by law to hear and determine controversies concerning certain subjects between parties who are properly before the court, either by voluntary appearance or service of process; and, as applied to any particular controversy, jurisdiction is the power to hear and determine that controversy as between the parties thereto who are before the court. What may be adjudged between the parties is the exercise of jurisdiction, and no error in the exercise of jurisdiction, no matter how gross, can be urged in any collateral proceeding. If a court has jurisdiction its judgment may be directly attacked for errors or irregularities, but however manifestly erroneous the decision may be, it is binding upon all parties and privies until it is reversed or set aside in a direct proceeding for that purpose.

The People v. Kidd, 398 Ill. 405 at 409, 75 N. E. 2d 851 at 854;

Bachrach v. Burkhardt, 344 Ill. App. 80 at 86, 100 N. E. 2d 334 at 337.

II.

Appellant was not deprived of his interest in the real estate by the payment of the value fixed therefor to the County Treasurer pursuant to Section 14, Chapter 47, Illinois Revised Statutes 1953.

(A)

"Both the constitutional and statutory requirements of just compensation are satisfied when the amount ascertained as such is paid to the county treasurer for the benefit of the owners and parties interested in the premises. This payment to the treasurer fully protects the rights of

all parties and when the compensation money is so paid, all connection of the petitioner with the case ceases and it is no further concerned with it. (Forest Preserve Dist. v. Chicago Title and Trust Co., 351 Ill. 48; Public Service Co. v. Rietveld, 320 Ill. 56.) The treasurer holds the money in trust for the owners thereof, who may compel payment to them at any time, either by petition in the same proceeding, or by some appropriate action, either at law or in equity, in the same or some court other than the one which entertained the condemnation proceedings. (City of Chicago v. McDonough, 351 Ill. 200.) It would be against public policy and contrary to the spirit and intent of the constitutional and statutory provisions concerning the right of eminent domain to hold that the public use of the property must be delayed until all interests in the property have been ascertained and the proper distribution of the compensation money definitely determined."

County of Cook v. Vander Wolf, 394 Ill. 527 at 528, 69 N. E. 2d 260 at 263;

Chicago & Northwestern Railway Company v. The Chicago Mechanics Institute, 239 Ill. 217, 87 N. E. 942.

SUGGESTIONS.

I.

In his motion to vacate the 1953 judgment, appellant claimed it was void because the court did not acquire jurisdiction over him either by personal or by substituted service. His contention in this regard was true he said, because the affidavit upon which the publication notice was predicated was not sufficient to give the court jurisdiction.

The Illinois Supreme Court held that the affidavit was in compliance of Section 14 of Chapter 110, Illinois Revised Statutes 1953 and that the judgment in the condemnation proceeding was binding upon appellant.

Appellant does not now question that ruling. Jurisdiction over the person of appellant was the only issue raised by the motion he filed in the trial court and that was the only issue decided by the Illinois Supreme Court.

Inasmuch as the time to appeal from the 1953 judgment had expired at the time appellant's motion to vacate was filed, that judgment was final and is binding upon him.

II.

The language of the Illinois Supreme Court relating to the payment to the County Treasurer by appellees was not necessary for a decision that the trial court had jurisdiction of the appellant at the time the 1953 judgment was entered. However, no constitutional rights of the appellant have been denied him by the use of such language.

The interests of the parties in the real estate taken in the condemnation proceedings had not been determined

prior to the judgment of condemnation. The judgment ordering payment to the County Treasurer protected the rights of all interested persons. The fund paid by appellee for the real estate was held by the County Treasurer in lieu of the real estate ordered taken. Any interested party was free to petition the Court for an order on the County Treasurer directing payment of that fund, or any part thereof to him, or for any other protective order. The court having had jurisdiction of appellant in the original condemnation proceedings, he is now in no position to complain that payment of that fund was erroneously made, or that his rights thereto were not fully protected. If the order of distribution was not satisfactory a right to appeal therefrom was preserved to him (See Appendix III).

The case of **Convers v. The Atchison, Topeka and Santa Fe R. R., 142 U. S. 671, 35 L. Ed. 1153,** cited by appellant, is distinguishable from this case for two reasons, (1) the interests of the parties in the real estate were not disputed, and (2) the case was a direct appeal from a trial court judgment.

CONCLUSION.

We respectfully submit that the Motion to Dismiss or Affirm should be allowed because this case does not involve a question of the constitutionality of any statute, nor any question of great public importance. The only issue passed upon by the Supreme Court of Illinois in this case was an interpretation of an Illinois Statute (Sec. 14, Chap. 110, Illinois Revised Statutes, 1953) and no complaint is directed against the decision in that respect. The reference by the Illinois Supreme Court to the payment by appellees to the County Treasurer was not necessary to the opinion, but it does not deprive appellant of his property without due process of law since the

appellant at all times was subject to the jurisdiction of the trial court.

All of which is respectfully submitted,

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APPENDICES.

No.

I. Pertinent Section of Civil Practice Act of Illinois, Section 138, Chapter 110, Illinois Revised Statutes 1953.

II. Pertinent Section of Civil Practice Act of Illinois, Section 72, Chapter 110, Illinois Revised Statutes 1959.

III. Pertinent Section of Eminent Domain Act of Illinois, Chapter 47, Section 12, Illinois Revised Statutes 1953.

IV. Pertinent Section of Civil Practice Act. Chapter 110, Sections 198 and 200, Illinois Revised Statutes 1953.

I.

Pertinent Section of Civil Practice Act of Illinois Section 138, Chapter 110, Illinois Revised Statutes 1953.

138. § 14. (Service by publication—Affidavit—Mailing—Certificate.) Whenever, in any civil action affecting property or status within the jurisdiction of the Court, including an action to obtain the specific performance, reformation, or rescision of a contract for the conveyance of land, or in any action at law to revive a judgment or decree, plaintiff or his attorney shall file, at the office of the Clerk of the court in which his suit is pending, an affidavit showing that the defendant resides or has gone out of this State, or on due inquiry cannot be found, or is concealed within this state, so that process cannot be served upon him, and stating the place of residence of such defendant, if known, or that upon diligent inquiry his place of residence cannot be ascertained, the Clerk shall cause publication to be made in some newspaper published in the county where the suit is pending, and if there be no newspaper published in such county, then in a newspaper published

in an adjoining county in this state, having a circulation in the county in which suit is pending, containing notice of the pendency of such suit, the title of the court, the title of the case, showing the names of the first named plaintiff and first named defendant, the number of the case, the names of the parties to be served by publication, and the date on or after which default may be entered against him; and he shall also, within ten days of the first publication of such notice, send a copy thereof by mail, addressed to each such defendant whose place of residence is stated in such affidavit. The certificate of the Clerk, that he has sent such copy in pursuance of this section shall be evidence that he has done so. As amended by act approved Aug. 8, 1949. L. 1949, p. 1191.

II.

Pertinent Section of Civil Practice Act of Illinois, Section 72, Chapter 110, Illinois Revised Statutes 1959.

72. § 72. Relief from judgments and decrees. (1) Relief from final orders, judgments and decrees, after 30 days from the entry thereof, may be had upon petition as provided in this section. Writs of error coram nobis and coram vobis, writs of audita querela, bills of review and bills in the nature of bills of review are abolished. All relief heretofore obtainable and the grounds for said relief heretofore available, either at law or in equity, whether by any of the foregoing remedies or otherwise, shall be available in every case, by proceedings hereunder, regardless of the nature of the order, judgment or decree from which relief is sought or of the proceedings in which it was entered. There shall be no distinction among actions at law, suits in equity and other proceedings, statutory or otherwise, as to availability of relief, grounds for relief or the relief obtainable.

(2) The petition must be filed in the same proceeding in which the order, judgment or decree was entered but is not a continuation thereof. The petition must be supported by affidavit or other appropriate showing as to matters not of record. All parties to the petition shall be notified as provided by rule.

(3) The petition must be filed not later than 2 years after the entry of the order, judgment or decree. Time during which the person seeking relief is under legal disability or duress or the ground for relief is fraudulently concealed shall be excluded in computing the period of 2 years.

(4) The filing of a petition under this section does not affect the order, judgment or decree, or suspend its operation.

(5) Unless lack of jurisdiction affirmatively appears from the record proper, the vacation or modification of an order, judgment or decree pursuant to the provisions of this section does not affect the right, title or interest in or to any real or personal property of any person, not a party to the original action, acquired for value after the entry of the order, judgment or decree but before the filing of the petition, nor affect any right of any person not a party to the original action under any certificate of sale issued before the filing of the petition, pursuant to a sale based on the order, judgment or decree.

(6) Any order entered denying or granting any of the relief prayed in the petition is appealable.

(7) Nothing contained in this section affects any existing right to relief from a void order, judgment or decree, or to employ any existing method to procure that relief. As amended by act approved July 19, 1955. L. 1955, p. 2238.

III.

Pertinent Section of Eminent Domain Act of Illinois, Chapter 47, Section 12, Illinois Revised Statutes 1953.

12. Appeal. § 12. In all cases, in either the circuit or county court, or before a Circuit or County Judge, an appeal as in other civil cases shall lie to the Supreme Court, except that no appeal shall lie from any order denying a motion to strike the declaration of taking and dismiss the suit, unless notice of appeal is filed within 30 days from the entry of the order, and for the purposes of such appeal such order shall be deemed to be a final order. As amended by act filed Aug. 13, 1949. L. 1949, p. 866.

IV.

Pertinent Section of Civil Practice Act, Chapter 110, Illinois Revised Statutes 1953.

"198. § 74. (Method of Appellate review.) (1) Every order, determination, decision, judgment or decree, rendered in any civil proceeding, if reviewable by the Supreme or Appellate Court of this State by writ of error, appeal or otherwise, shall hereafter be subject to review by notice of appeal, and such review shall be designated an appeal and shall constitute a continuation of the proceeding in the court below. Such appeal shall be deemed to present to the court all issues which heretofore have been presented by appeal and writ of error.

(2) All distinctions between the common law record, the bill of exceptions and the certificate of evidence, for the purpose of determining what is properly before the reviewing court, are hereby abolished. The trial court record shall include every writ, pleading, motion, order, affidavit and other document filed or entered in the cause and all matters before the trial court which shall be cer-

tified as a part of such record by the judge thereof. All matters in the trial court record actually before the court on appeal may be considered by the court for all purposes, but if not properly authenticated the court may order such further authentication as it may deem advisable."

"200. § 76. (Limitation of review—Perfection of appeal.) (1) No appeal shall be taken to the Supreme or Appellate Court after the expiration of ninety days from the entry of the order, decree, judgment or other determination complained of; but, notice of appeal may be filed after the expiration of said ninety days, and within a period not to exceed fourteen months from the entry of the order, decree, judgment or other determination complained of, by order of the reviewing court, entered within the fourteen months, upon motion filed and notice given to adverse parties within one year, and upon a showing by affidavit that there is merit in appellant's claim for an appeal and that the failure to file notice of appeal within the ninety day period, or the failure properly to complete an appeal which was perfected within such period was not due to appellant's culpable negligence. The fact that appellant may have filed a notice of appeal prior to the filing of his motion for leave to appeal shall not deprive the reviewing court of the power in the discretion to grant leave to appeal. The reviewing court in its order granting leave to appeal shall fix the time for the filing (within the fourteen month period) of the notice of appeal which it allows."